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Legal analysis of the EU-Turkey statement of 18 March 2016: past and future

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Abstract: The present paper tries to analyze the statement of 18 March 2016 through the historical path of the migration policy between EU and Turkey. This is yet another stage that shows the intensity not so much of the relations between Greece and Turkey but of EU and Turkey. The continuous flows from Syria and especially now after the crisis of the war in Ukraine allow us to investigate this statement which remains relevant to this day and shows the attempts and struggles between the EU and external borders to address the problem of migration. A continuous challenge that becomes even more interesting through the sentences coming from the ECtHR and the CJEU.

Keywords: EU law; statement between EU-Turkey; migratory flows; non-refoulement; EctHR; CJEU.

Introduction

For many years Turkey was considered a transit country for mixed migratory flows, i.e. those seeking asylum and economic stability. Faced with this need, the EU signed a first declaration, the EU-Turkey statement of 18 March 2016 which aimed to address the migratory crisis which was created as a Balkan route also influencing neighboring countries such as Greece since 2015. The EU has already had a trade association agreement with Turkey signed in 1963[1] as well as a customs union since 1995[2].

Turkey's continued need to enter the European fair was already evident from the Helsinki European Council of 1999 as a candidate country for membership. To date, there are many difficulties, above all political and technical, but also concerning

1https://www.eeas.europa.eu/turkey/european-union-and-turkey_en; https://www.rescue.org/eu/article/what-eu-turkey-deal; https://www.unhcr.org/gr/en/22885-unhcrs-position-and-recommendations-on-the-safe-third-country-declaration-by-greece.html;

2Decision no. 1/95 of the EC-Turkey Association Council, of 22 December 1995, relating to the implementation of the final phase of the customs union, in OJ EU 35 of 13 February 1996, p.1.

the lack of respect for the rule of law, the violations of human rights of Turkish citizens and migrants, the operations carried out in Syria, the continuous violations in Greek airspace and territorial waters and above all the Cyprus problem (Stanicek, 2020)[3], in other words a list of problems that poses difficulties in Tirkey for full membership in EU (Ott, 2017).

Already in the field of immigration since 2014 (Mcaulife, Triandafyllidou, 2022) a disciplinary agreement has been concluded between the readmission of Turkish citizens and third-country nationals and stateless persons with a deadline by 2017. This agreement was concluded not only for "bridge" migratory flows but also included a clause relating to the readmission of citizens of third states and stateless persons which was brought forward to 1st June 2016 after the EU-Turkey statement[4]. This

3Resolution adopted by the European Parliament on 13 March 2019, European Parliament resolution of 13 March 2019 on the 2018 Commission Report on Turkey (2018/2150(INI)).

4Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a decision of the Joint Readmission Committee on implementation methods for applying Articles 4 and 6 of the Agreement on the Readmission of Persons in an Illegal Position between the European Union and the Republic of Turkey from 1 June 2016, in OJEU L 95 of 9 April 2016, p. 9.

declaration instrument had as its objective to put an end to irregular migration from Turkey to the EU, dismantling the traffickers' business model and at the same time offering "migrants an alternative to putting their lives at risk". It is an extraordinary measure of a temporary nature, that it still continues to be applied and, indeed, seems destined to crystallize. A model of cooperation inaugurated with the statement is likely to be used by the Union also with the countries of North Africa, to manage the migratory flows that reach Europe through the so-called central Mediterranean route[5].

Let us not forget that the statement is part of a model of the general policy of the external relations of the Union with other third countries concerning the imputability of an instrument of a legal nature. The application methods of the EU-Turkey statement verify the concrete effectiveness of problematic profiles from the general point of view of the protection of the human rights of the subjects involved in migratory flows.

5European Commission, EU-Turkey Statement. Four years on March 2020: https://home-affairs.ec.europa.eu/system/files/2020-03/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

What are the objectives of the EU-Turkey statement?

The EU-Turkey statement of 18 March 2016 includes the relevant measures in the framework of the meeting which took place during the European Council between the Heads of States and Governments of the Member States as well as Turkish representatives. The President of the European Council and the President of the Commission were also present at the meeting to show the importance of the meeting in this regard.

We are talking for a political dialogue about an EU-Turkey action plan which was adopted on 15 October 2015 and where the parties have identified a series of actions taken to support Syrians and recognizing temporary protection in Turkey and local communities strengthening cooperation in the fight against illegal immigration[6].

The Union aimed to provide economic support and humanitarian assistance to Syrians and local communities as well as to national and European resettlement programs and to tackle human

6EU-Turkey joint action plan, 15 October 2015, MEMO/15/5860: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860

traffickers. In particular, Turkey had to apply internal legislation on immigration and asylum and to increase the capacity of the coast and border guards in the interception stage of irregular migrants (Cremona, 2018) reaching the territory of the Union by sea or by land and speed up the readmission procedure for irregular immigrants as well as existing readmission agreements.

The Action Plan was a follow-up for the European Commission, the High Representative and the Turkish government through the establishment of a high-level working group of the EU-Turkey on migration matters. In particular at the Summit of 29 November 2015:

> "(...) the parties reiterated their desire to intensify cooperation for the support of Syrians under temporary protection and the management of the migratory crisis caused by the situation in Syria (…). The initiatives adopted under the Joint Action Plan must aim to contain the influx of irregular migrants as much as possible, preventing travel to Turkey and the EU, ensuring the application of bilateral readmission provisions in force and rapidly returning migrants who do not need international protection in their countries of origin (...)"[7].

The statement highlighted the pre-established context during the meeting between the Heads of States and Governments of the EU

7Press Office press release of the General Secretariat of the Council n. 870/15 of 29 November 2015, Meeting of EU Heads of States and Governments with Turkey, 29.11.2015 - EU-Turkey Statement, par. 7.

and Turkey which was concluded on 7 March 2016[8]. On 18 March in particular, the parties reconfirmed their mutual commitment to implement the joint action plan activated on 29 November 2015, agreeing to this end on some additional points. It can be considered that the act falls within the political dialogue established between the Union and the Turkey starting from 15 October 2015 and is aimed at implementing it, establishing in more detail the commitments of the parties. It provides for the rapid repatriation to Turkey of all irregular migrants who have made the crossing from Turkey to the Greek islands after 20 March 2016. All migrants arriving on the Greek islands must be registered and the proposed asylum applications must be processed individually on the basis of the provisions of the so-called procedures directive[9]. Persons who do not apply for international protection and those whose application is deemed inadmissible or unfounded will be repatriated to Turkey at the

8Press Office press release of the General Secretariat of the Council n. 807/16 of 8 March 2016, Declaration by the Heads of States and Governments of the EU: https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/

9Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60-95.

expense of the Union in application of existing bilateral readmission agreements. All irregular migrants intercepted in Turkish waters will be returned to Turkey. It also ensures that the repatriations will take place in full compliance with the relevant international and European regulations and, especially, the prohibitions on refoulement and collective expulsions[10].

The legal basis guarantees faster repatriations of asylum seekers to standards of rights protection which recognize the application to Turkey of the concepts of country of first asylum as well as safe third country according to Articles 35 and 38 of the Procedures Directive[11]. In the first case, the third country has recognized the refugee status, enjoying sufficient protection for this country which includes the benefit of non-refoulement by readmission to the country itself. In the second case the subject does not receive any protection but the third country guarantees effective access to it[12], thus:

10Press Office press release of the General Secretariat of the Council n. 807/16 of 8 March 2016, Declaration by the Heads of States or Governments of the EU, op. cit.

11Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2016, Next operational steps of EU-Turkey cooperation on migration, COM(2016) 166, pp. 3-4.

12Communication from the Commission to the European Parliament, the

> "(...) the authorities of the Member States can apply the concept of safe third state only after having ascertained that the risk does not exist of persecution or serious harm to the interested party, that the principle of non-refoulement is respected and, lastly, that there is the possibility of requesting and obtaining refugee status in accordance with the Geneva Convention"[13].

The application of the concept of safe third country is subordinated to the introduction, within the legislation of each Member State, of rules that allow it to be verified whether a given third country can be considered safe for the applicant in question. The method followed by the authorities competent to carry out this assessment (be it case-based or based on the adoption of a list of third countries presumed to be safe) and provide for a link between the applicant and the third country in question is such that it would be reasonable for the first to go there. This gives the possibility for the applicant to dispute both the existence of such a link and the fact that that country is not safe in its specific case[14].

International protection of subjects coming from safe third countries or third countries of first asylum is provided for

European Council and the Council of 16 March 2016, op. cit.
13Art. 38 par. 1 of Directive 2013/32/EU.
14Art. 38 par. 2 of Directive 2013/32/EU.

through an accelerated procedure. These are requests, however, that are declared as inadmissible and without proceeding to an assessment of merit[15]. These perspectives are procedures that are subordinate to the development by Member States of lists of third countries that are considered safe and in line with the spirit of Directive 2013/32/EU. The Declaration was also based on the assumption that Turkey is a safe third country where the proper functioning as an instrument requires Greece and Turkey to change their legal system. In particular, Greece should include Turkey in the list of third countries as safe and introduce detailed procedural rules. On the other hand, Turkey should be included in the list of safe third countries containing detailed procedural rules and guaranteeing people in need of international protection, i.e. a protection that is equivalent with the Geneva Convention[16]. Turkey has also undertaken to combat the creation of new maritime or land routes of irregular immigration towards the Union, collaborating to this end with the latter and with neighboring countries. This provides a series of compensatory

15Art. 38 par. 2 of Directive 2013/32/EU.
16Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2016, op. cit., 3-4.

measures as a counterpart to the assumption by the Turkish government of the commitment to contain the flows and to welcome those seeking protection on its territory. The disbursement by the Union of a sum equal to 3 billion euros aims to finance projects to support refugees, especially in the fields of humanitarian assistance, health, education, infrastructure and to provide for socio-economic support. Furthermore, once the first tranche of funding has been exhausted, the EU undertakes to provide the same amount of funds by the end of 2018[17].

This financial support was provided through the Facility for Refugees in Turkey. This is a fund mechanism that has established an ad hoc decision by the Financial Coordination Commission that comes from numerous existing instruments[18]. It is a compensatory measure that was foreseen by the Declaration and the related 1 plus 1 system which states that: "(...) for every Syrian repatriated to Turkey from the Greek islands another

17European Commission, EU-Turkey Statement. Four years on, March 2020:https://home-affairs.ec.europa.eu/system/files/2020-03/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf

18Commission Decision of 24 November 2015 on the coordination of Union and Member State initiatives through a coordination mechanism, the Turkey Refugee Facility, in OJEU C 407 of 8 December 2015, p. 8.

Syrian will be resettled from Turkey to the EU", agreeing priority to migrants who have not previously entered or have not attempted to enter the EU irregularly. This is a numerical parameter aimed at identifying a number of resettlements from Turkey in the Union equal to the number of irregular migrants repatriated from the Greek islands in Turkey. However, to fully understand the functioning of this mechanism, some clarifications are necessary. The resettlement takes place "within the framework of existing commitments"[19], i.e. the reference is to the commitments undertaken on the basis of the European resettlement program and the decisions on relocation of 2015[20]. The 18,000 places mentioned in the Declaration are subtracted from the 22,504 places that had already been allocated for

19Press Office press release of the General Secretariat of the Council n. 807/16 of 8 March 2016, op. cit., par. 1.

20Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146-156: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1523

Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80-94: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601

resettlement during the Council meeting of 25 July 2015[21]. In case the units available under the resettlement program run out resettlement, it will be possible to add a further 54,000 places, subtracting them from the 160,000 units established by the decisions on relocation[22]. This does not imply a commitment on the part of the Member States to welcome refugees from Turkey in addition to that already undertaken by them with the decisions on relocation in 2015 and the European resettlement program. A restyling operation of existing commitments is interrupted when the number of repatriations exceeds 72,000 units and the close connection between repatriation and resettlement is not informed to the sharing of burdens between the Union and Turkey with regards to the reception of migrants. Just think that the Member States have made themselves available to resettle a maximum of 72,000 people compared to the 4 million refugees and asylum

21Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme, C/2015/3560, OJ L 148, 13.6.2015, p. 32–37:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015H091

22Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 268, 1.10.2016, p. 82-84: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016D1754

seekers currently present in Turkey and that, at the end of September 2021, the Syrian refugees actually resettled in the Union amounted to only 31,000[23].

This is a mechanism inspired by the political will to protect migrants and people traffickers who aim to reach Europe via Greece and not just using regular immigration channels. According to the statement, in case of irregular crossings between Turkey and the Union, the Member States will be able to activate, on a voluntary basis, a humanitarian admission program. Also further incentives proposed by the Union to the Turkish counterpart at the order to strengthen cooperation consisting of a commitment to relaunching the accession process and accelerating the fulfillment of the roadmap on visa liberalization for the entry of Turkish citizens into the Union. Thus, visa liberalization and at present, membership objectives appear to be quite difficult to achieve[24].

23Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committree of the Regions on the Report on Migration and Asylum, COM/2021/590 final:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0590

24Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committree

What is the legal nature of the EU-Turkey statement?

From the previous paragraphs we understood that the statement between EU-Turkey has a flexible and informal nature without respecting the relevant procedure for the stipulation of international agreements which was provided for by Art. 218 TFEU (Blanke, Mangiamelli, 2021).

This is a provision that attributes a central role to the Council and in all phases of the procedure according to the measure that:

> "(...) authorizes the start of negotiations, defines the negotiating directives, authorizes the signature and concludes the agreements (...)" (Blanke, Mangiamelli, 2021)[25].

Within this framework, the function of the European Parliament participates in the conclusion phase of the agreement and calls, expresses and approves the agreement before the Council adopts the decision relating to its conclusion.

Thus we note the obligation to keep the European Parliament informed during all phases of the procedure. A procedure under consideration which includes consultation by the Court of Justice of the European Union (CJEU) which takes a position following

of the Regions on the Report on Migration and Asylum, op. cit.
25Art. 218 par. 2 TFUE.

the request of a Member State, the European Parliament, the Council or the Commission in accordance with the international agreement and the principles of the Union. Thus the deformalized nature of the Declaration complicates its imputability and legal value. Due to the position of the institutions, the European Council, the Commission and the Council have excluded the statement of an international agreement which was informally stipulated. The legal nature of the Declaration is the subject of a specific debate within the European Parliament and in the opinion of the Legal Service of the European Parliament[26]. The statement states that:

> "(…) ruled out that the statement could be considered an international agreement. Rather, it would be a non-binding instrument that fits into the already existing political dialogue between the Union and Turkey in the field of immigration and asylum and which, despite the unclear wording, complies with EU law (...)" (Nielsen, 2016).

The issue was brought to the attention of the Court of Justice, which however only ruled on the imputability of the statement, avoiding expressly ruling on its legal nature (Spijkerboer, 2018;

26The opinion was given during the sitting of 9 May 2016 of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament (LIBE): Legal aspects of the EU-Turkey statement of 18 March 2016, LIBE/8/06399, Presentation by the legal service.

Leboeuf, 2019).

Within this context we take into consideration the order issued by the Court in the NF v. European Council case which was based on Art. 263 TFEU and after a request from an asylum seeker from Pakistan who arrived in Greece by sea from the Turkish coast in March 2016[27]. In the event the statement it is qualified as an international agreement concluded by the European Council. The appellant asks the Court to annul the contested act, invoking, in support of the appeal, both the failure to comply with the Charter - in particular with Articles 1, 18 and 19 CFREU - that the violation of the procedure provided for by Art. 218 TFEU[28].

On the other hand, the European Council objected to the inadmissibility of an appeal which produces the relevant documentation which is suitable to attest to the declaration only the result of an international dialogue between the Member States and the (Republic of) Turkey and, in light of its content and the

27Ex Tribunal for first Instance: T-192/16, NF v. Council of 28 February 2017, ECLI:EU:T:2017:128, not yet published. Order in case: T-193/16, NG v. European Council of 22 April 2017, ECLI:EU:T:2017:129, not yet published.

28Ex Tribunal for first Instance: T-192/16, NF v. Council of 28 February 2017, op. cit., par. 16.

intentions of its authors, (it would not) be intended to produce binding legal effects nor to constitute an agreement or a treaty. The Commission and the Council are of the same opinion. The former leverages the terminology used excluding that the statement can be considered a legally binding agreement (Peers, 2016; Babickà, 2016) and the second specifies that it is not in any way involved in the dialogue held between the representatives of the Member States and Turkey[29].

The Court rejected the appeal and stated that:

> "(...) declaring its incompetence to hear the same since the contested act could not be attributed to any institution, body or agency of the Union (...) of an act adopted by the representatives of the Member States gathered within the European Council, who do not act so much as members of the Institution, but in their capacity as Heads of States or Governments of the individual Member States (...) are removed from the scrutiny of legitimacy of the Court of Justice, competent to rule solely on the legitimacy of acts emanating from community bodies (…)".

In order to establish the author of the act, it is necessary to evaluate its content and the context in which the statement was adopted. The content is not considered due to the ambiguity of the terms used; as regards the context, the Court uses the

29Ex Tribunal for first Instance: T-192/16, NF v. Council of 28 February 2017, op. cit., par. 29-31.

documentation provided by the European Council to demonstrate that the meeting which concluded with the adoption of the Declaration took place during a summit between Heads of States held in the margins of another meeting of the European Council held on the same day while the former would have acted on behalf of the heads of states and governments of the Union, the presence of the latter would be justified by the fact that the meeting of 18 March 2016 constituted a continuation of the political dialogue started by same Commission in October 2015. It limits itself to stating, ad abundatiam, that even assuming that an international agreement could have been concluded informally during the meeting of 18 March 2016. This agreement would have occurred between the heads of states or governments of the Member States of the Union and the Turkish Prime Minister. It rejects the appeal with an order of manifest inadmissibility, considering the wording of the appeal excessively vague and imprecise[30].

Continuing with the Access Info Europe v. Commission case,

30CJEU, order in joined cases C-208/17 P to C-210/17 P, NF and others v. Security Council of 12 September 2018, ECLI:EU:C:2018:705, published in the electronic Reports of the cases.

where the EU General Court stated that:

> "(…) the non-binding nature of the Declaration, it refers to political commitments negotiated and concluded, under the name of EU-Turkey declarations, between the Heads of States or Union governments and their Turkish counterpart (...)"[31].

We are talking about positions that concern the legal nature of the statement which, as also in the European Court of Human Rights (ECtHR) and in the J.R and others v. Greece had as its object the conditions of detention and reception of migrants on the Greek islands. The statement defined it as:

> "(…) un accord sur l'immigration conclu (…) entre les États membres de l'Union européenne et la Turquie (…) une déclaration visant à lutter contre les migrations irrégulières (…)" (Sudre, 2021; Grabenwarter, Pabel, 2021; Villiger, 2023)[32].

The profile of imputability and attribution of the authorship of the declaration to the Member States of the Union is questionable. And that's all given that the law of the Union does not exclude that Member States act within a context that is part of public international law by stipulating agreements between themselves and with third states[33]. It is not infrequent that

31Ex Tribunal for First Instance: T-852/16, Access Info Europe v. European Commission of 07 February 2018, ECLI:EU:C:2018:71, published in the electronic Reports of the cases, par. 84.
32ECtHR, J.R. and others v. Greece of 25 January 2018, parr. 7 and 39.
33CJEU, joined cases C-181/91 to C-248/91, Parliament v. Council and Commission of 30 June 1993, ECLI:EU:C:1993:271, I-03685, par. 16.

Member States thus try to delegate the relevant representatives of the institutions to act in the name and on behalf of those who are outside the law of the Union[34].

The statement appears to be an act attributable to the Union. It was also included in a press release which stated:

> "(...) the initiatives envisaged in it are presented as "additional action points" of the Joint Action Plan activated in November 2015 by the Commission (…). It had announced the content of the statement in a Communication addressed to other political institutions, entitled "Next operational phases of EU-Turkey cooperation on migration" (...)"[35].

On the other hand, the funds disbursed are also part of the budget of the Union and partly of that of the individual Member States which are part of the budget of the Union and administered throughout the Commission and in its own management. A further element is the attribution of the statement to the Union and not to its Member States which are part of the examination of the practice in its implementation and in the periodic reports that are presented in the Commission and to the political

34CJEU, C-370/12, Pringle of 27 November 2012, ECLI:EU:C:2012:675, published in the electronic Reports of the cases, par. 158.
35Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2016, Next operational steps of EU-Turkey cooperation on migration, op. cit.

institutions[36]. The statement agrees and underlines that the attribution of the authorship of the act is problematic and in accordance with Art. 3, par. 2 TFEU (Gatti, Oct, 2019). The legal nature of the seclaration according to the CJEU has taken much debated and evolving positions of criticism especially regarding that international law and the law of the Union forms an act, a nomen iuris and the related procedure for its adoption which assumes relevance according to the qualification of its own international agreement (Chang-Tung, Garcia, 2019; Hollis, 2020; Fitzmaurice, Merkouris, 2020)[37].

This type of orientation was also followed by the International Court of Justice which stated:

> "(...) the binding nature of an act can be deduced not so much from its form, but rather from its content and the circumstances of its conclusion, from which it is possible to deduce the actual

36Report from the Commission to the European Parliament, the European Council and the Council of 6 September 2017, Seventh progress report on the implementation of the EU-Turkey Statement, COM(2017) 470.

37See art. 2 par. 1 letter a) of the Vienna Convention on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between states and international organizations or between international organizations of 1986 which is affirmed that: "the term "treaty" means an international agreement concluded in writing between states and regulated by international law, which is constituted by a single instrument or by two or more connected instruments, whatever their particular denomination (...)".

> will of the parties to bind themselves (...)"[38].

Such acts give an account of what was discussed by the parties and summarize the points on which they agree or disagree. However these are not to be considered international agreements, since which do not give rise to rights and obligations that are different and additional to those already existing (Liakopoulos, 2020)[39].

These are positions that have also been taken into consideration by the CJEU where the notion of an international agreement:

> "(...) must be understood in a general sense, that is, it designates any commitment of a binding nature undertaken by subjects of international law, regardless of its form"[40].

It is precisely by applying these jurisprudential criteria that the

38See the sentence of 26 May 1962 on the preliminary exceptions in the case of the Temple of Preah Vihear (Cambodia v. Thailand), in ICJ Reports, 1961, par. 33-34. ICJ, Aegean sea continental shelf (Greece v. Turkey) sentence of 19 December 1978, par. 96. Maritime delimitation and territorial questions (Qatar v. Bahrain), sentence of 1st July 1994, ICJ Reports, 1994, par. 112.

39ICJ, Maritime delimitation and territorial questions (Qatar v. Bahrain), sentence of 1st July 1994, op. cit, par. 25.

40CJEU, Opinion 2/75, Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Mackprang of 11st November 1975, ECLI:EU:C:1975:65, I-00607. C-327/91, France v. Commission of 09 August 1994, ECLI:EU:C:1994:305, I-03641, par. 27. joined cases C-103/12 to C-165/12, Parliament and Commission v. Council of 26 November 2914, ECLI:EU:C:2014:2400, published in the electronic Reports of the cases, par. 83.

majority doctrine leans towards the binding nature of the EU-Turkey statement (Corten, Dony, 2017). The willingness of the parties to bind themselves could be deduced from the text of the act. There we read, in fact, that the parties "have decided" to put an end to irregular immigration from Turkey to the Union and that, to this end, they "have agreed" to undertake some initiatives. The changes made by the parties to the respective internal systems in order to implement the commitments set out in the statement would constitute an indication of the binding nature of the obligations contained therein (Spijkerboer, 2018).

Turkey has reformed its internal legislation on international protection and the Union has modified the decisions that reconnect the guarantee, the functioning of the 1 to 1 system with Greece adopting thus the relevant specific measures that allow rapid repatriation in Turkey of its migrants and asylum seekers who have landed on the Greek islands (Gatti, Ott, 2019)[41]. The

41See the Law 4375/2016 adopted on 1 April 2016 by the Greek Parliament and subsequent amendments. See European Council on Refugees and Exiles (ECRE) (April, 2016, 08): Greece urgently adopts controversial law to implement EU-Turkey deal. ECRE: https://ecre.org/greece-urgently-adopts-controversial-law-to-implement-eu-turkey-deal/ We understand that the EU-Turkey declaration has brought about a relative contrast in the asylum procedures that are applied in Greek territory. This type of relationship

qualification of the act as an international agreement that is concluded in the Union represents the circumstance where the commitments appear in the statement reproduce the obligations that already exist as well as the innovative content that is suitable for impacting the norms of the European Union. These are financial commitments that have to do with Turkey's qualification as a country that reassures its citizens based on the repatriation mechanism and the 1 to 1 system (Gatti, Ott, 2019).

Within this context, Art. 218 TFEU for the conclusion of international agreements and the CJEU argued that its constitutional nature is part of the legal system of the Union[42]

results from the implementation of applicants who landed on the Greek islands after 20 March 2016 and are part of a border procedure which provides the relevant guarantees of a limited nature which respect the ordinary procedure. With the subsequent Law 4636/2019, adopted on 1 November 2019 and entered into force on 1 January 2020, also known as the International Protection Act (IPA). This regulation has been criticized by national and international bodies for the protection of human rights and the protection standards that introduces greater substantial and procedural obstacles that have to do with the presentation of the acceptance of applications for international protection that it exposes to applicants during the period of refoulement.

42CJEU, C-327/91, France v. Commission of 09 August 1994, op. cit., par. 28. See the conclusions of the Advocate General in case C-425/13, Commission v. Council of 16 July 2015, ECLI:EU:C:1993:483, published in the electronic Reports of the cases, par. 37.

thus establishing that the violation of this type of procedure entails the invalidity of the decision to conclude the agreement as this continues to bind the Union especially at an international level[43]. Conciliation in the internal, external sphere is only possible when the Union places the agreement through the methods that are established therein and proceeds with its own renegotiation.

In the NF v. European Council sentece the CJEU stated that: "(...) in the future we will be able to declare the illegitimacy of the statement due to violation of Art. 218 TFEU (…)"[44].

This is an act attributable to the Member States rather than to the Union which excludes the possibility of annulment appeals as well as the possibility that the CJEU calls to rule on the compatibility of the declaration with the law of the Union and by virtue of a question of a preliminary ruling nature that has to do with an internal judgment and especially in our case with the validity of documents from a Greek judge (Spijkerboer, 2018).

43CJEU, CJEU, joined cases C-181/91 to C-248/91, Parliament v. Council and Commission of 30 June 1993, op. cit.

44Ex Tribunal for first Instance: T-192/16, NF v. Council of 28 February 2017, op. cit.

The effectiveness on the international level of an agreement that is concluded according to the violation of internal rules having to do with the competence to stipulate in customary international law requires that it continues to produce effects despite the fact that the parties invoke the provisions of their own legislation of nature internal and which justifies the failure to execute a treaty[45]. This context, hoever, contains a relative exception. In particular, the violation of domestic law which has to do with the competence to stipulate, invoke as a cause of invalidity of the agreement at the international level the violation which manifests itself as recognizable in good faith, as a rule which considers the law as fundamental and important internal of the party asserting[46]. The ICJ has shown a relative prudence that recognizes the existence of prerequisites[47] to a right of the Union

45Art. 27 of the Vienna Convention on the Law of Treaties of 1969 and Art. 27 par. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, which reflect customary international law.

46Art. 46 of the Vienna Convention on the Law of Treaties of 1969 and Art. 46 par. 2 and 3 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

47ICJ, Land and maritime boundary (Cameroon v. Nigeria: Equatorial Guinea intervening) sentence of 10 October 2002, op. cit., parr. 248, 265-

regarding external competences that contribute to the scope of this type of exception (Aust, 2013). The Union invokes Art. 46 of the Vienna Convention where the CJEU itself stated a "constitutional" relevance to Art. 218 TFEU (Blanke, Mangiamelli, 2021). On the other hand, the existence of a dense network of relations linking Turkey to the Union (and which include accession negotiations) would lead to the assumption that Turkey is aware of the rules governing the procedure for concluding international agreements stipulated by the Union (Corten, Dony, 2016). In practice following the adoption of the statement, it emerges that both the Union and Turkey have continued to apply it without ever raising any doubts about its validity on the internal or on an international level. It also accepting the thesis according to which the statement constitutes an agreement concluded in violation of Art. 218 TFEU, it could hardly be declared invalid and therefore unproductive of effects on the international level. This by virtue of Art. 45 of the Vienna Convention, according to which the party which, despite knowing the existence of a violation of internal rules of

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fundamental importance, has explicitly accepted the validity of the treaty or has in any case implemented it loses the right to invoke its invalidity[48].

The binding nature of the EU-Turkey staement is not entirely convincing given the ambiguity of the terms used and the reasons we can imagine and not only. The statement shows that the initiatives contained are sometimes implemented in the political dialogue of the management of flows that are established between the Union and Turkey and through the Action Plan that was started in November 2015. The Declaration appears like this: "(...) as an instrument that aims to define on a political level a common strategy to put an end to irregular immigration". It is appropriate to underline how this strategy is based on the implementation of pre-existing commitments, which the parties reiterate in the statement and which reorganize, so to speak, in a "parallel" form the obligation on Turkey to readmit irregulars imigrants. This does not derive so much from the statement, but

48Art. 45 of the Vienna Convention on the Law of Treaties of 1969 and Art. 45 par. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

from the previous bilateral readmission agreement stipulated with Greece and concluded in 2014. In order to obtain a more systematic application of the readmission agreements, on the one hand, is based on the consideration of Turkey as a safe country and, on the other, provides for a significant financial commitment on the part of the Union and its Member States for the benefit of Turkey. The Facility for Refugees in Turkey constitutes a sort of "umbrella" of funding that had already been allocated to Turkey in the form of humanitarian or non-humanitarian aid[49].

In particular, the Commission established the instrument with a decision and:

> "(...) partially modified the destination of these disbursements, which had been allocated to the various funds by means of procedures established for this purpose (...) of the doubts both from the from a procedural point of view and from the point of view of the risk of diversion of funds, to the extent that the resources allocated to humanitarian aid and development aid are used to achieve objectives of containment of migratory flows" (Den Hertog, 2016).

Substantial compensatory measure in resettlement, on which the 1 to 1 mechanism is based, pre-existed the adoption of the EU-

49Art. 45 of the Vienna Convention on the Law of Treaties of 1969 and Art. 45 par. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

Turkey Declaration. The latter only entailed a remodulation of the quotas envisaged by the resettlement program and the decisions on relocation, in order to guarantee resettlement from Turkey into the Union of a number of Syrians capable of satisfying the numerical parameter established with the 1 to 1 system. There is no doubt that the desire to relaunch the accession process and the roadmap on visa liberalization constitutes a mere declaration of intent, which is destined to remain unimplemented in the short term (Den Hertog, 2016).

The statement followed the pre-established plans. It did not create rights and obligations for the parties but only further commitments of a political nature which were aimed at coordinating their respective actions and addressing the Syrian migrant crisis, excluding that the act could be thus qualified for an international agreement. The statement does not have a binding nature, which is understood ab initio and does not legitimize the content and does not exclude the critical issues that have arisen from its application as we see in the following paragraphs.

Turkey as a country of first asylum and as a safe third country

The statement resulted in a decrease in landings on the Greek islands where departures in practice decreased to around 94% compared to the period prior to March 2016. An increase in the number of people who lost their lives in the Aegean is revealed a questionable step towards adopting the statement as an effective tool[50].

The 1-to-1 system has failed in the face of 4 million refugees in Turkey and only 31,000 people have crossed over to European countries. The numbers involved would be impressive if we were not talking about human beings but only about numbers, without calculating the numbers of women, children and, vulnerable people (Eyraud, Vidal Naquet, 2013; Carlier, 2017). Within this context, the Commission advocated a relative modification to the Greek legislation on asylum so that Turkey was included in the list of safe third countries[51]. Greece adopted this list only in 2020

50European Commission, EU-Turkey Statement. Four years on, March 2020, op. cit.

51Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2016, Next operational steps of EU-Turkey cooperation on migration, cit., p. 3, in which the Commission

without obviously including Turkey[52].

Turkey as a safe third country is left to the appreciation of the relevant competent authorities who can reach the relevant positive and negative conclusions in this regard. On the one hand the Greek Asylum Service has been judged as inadmissible under the application of the safe third country criterion and the applications for international protection are submitted by applicants who are from Turkey and most of the appeals are against the decisions of inadmissibility by the appeal committees which denied Turkey the status of a safe third country given that the systematic violations of the principle of non-refoulement and of the detention practice had a generalized character and prevented the repatriation of the applicants to Turkey and in

considers that: "(…) the application of these provisions requires a modification of Greek and Turkish national law. In the case of Greece, this concerns Turkey's 'safe third country' status and will involve a set of detailed procedural rules in areas such as appeal procedures (…)".

52Greece publishes list of "safe origin" countries for asylum seekers. ekathimerini.com, 3 January 2020: https://www.ekathimerini.com/news/248105/greece-publishes-list-of-safe-origin-countries-for-asylum-seekers/ The third countries that the list considers safe are Ghana, Senegal, Togo, Gambia, Morocco, Algeria, Tunisia, Albania, Georgia, Ukraine, India and Armenia.

application of the statement[53].

Greece was under pressure and acted amending the composition of the appeal committees, speeding thus up the procedure for examining applications for protection and the related repatriation to Turkey. The committees were staffed by members from human rights bodies and one government-appointed member. The new composition sees the participation of two administrative judges with a single member appointed by UNHCR with the declared aim of making decisions objective and independent (Kingsley, Fotiadis, 2016; Tsiliou, 2018). Within this context we remember the Noori case relating to the attribution to Turkey of the status of safe country which was addressed by the Greek Council of State[54]. According to the ruling just cited:

> "(...) a law adopted in 2013 gives them the possibility of obtaining temporary protection, not comparable either to the refugee status referred to in the Geneva Convention or to the subsidiary protection provided for by Union law"[55].

53Communication from the Commission to the European Parliament, the European Council and the Council of 15 June 2016, Second progress report on the implementation of the EU-Turkey Statement, COM(2016) 349, p.6.

54Greek Council of State, ruling no. 2348 of 22 September 2017, Noori: https://www.refworld.org/cases,GRC_CS,5b1935024.html

55Limitation that is part of the declaration made by Turkey upon ratification of the Geneva Refugee Convention of 1951 relating to art. 1 (b). The declaration reiterated the act of ratification of the protocol relating to the

In 2014, a further temporary protection regime was introduced for Syrian citizens, which Turkey undertook to modify following the adoption of the statement, ensuring protection equivalent to that provided for by the Geneva Convention also for Syrians who had lost their status after leaving Turkey[56]. The assurances of the Turkish government are not equivalent to those guaranteed who enjoy the refugee status, to the extent that, on the one hand, it does not recognize the same rights protected by the Geneva Convention and, on the other hand, provides that the protection can be revoked by decision of the Council of Ministers without prior assessment of the individual position of the beneficiaries[57]. The Greek Council of State, confirming the ruling of the Appeals Committee, has qualified Turkey as a safe third country pursuant to Directive 2013/32/EU and, on this basis, declared the asylum application presented by a Syrian citizen inadmissible of the

status of refugees of 31 January 1967.

56Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2016, Next operational steps of EU-Turkey cooperation on migration, op. cit., pp. 3-4.

57Temporary Protection Regulation, of 22 October 2014, adopted on the basis of Law 6458/2013; Asylum Information Database, Greece: the ruling of the Council of State on the asylum procedure post EU-Turkey Deal, 4 October 2017.

criterion referred to in art. 38, par. 1, letter. e), dir. cit., by virtue of which Member States can apply the concept of safe third country only after having ascertained that in the country in question there is the possibility of requesting refugee status and, for those recognized as refugees, obtaining protection in accordance with the Geneva Convention[58].

The Greek Council of State stated that:

> "(...) this criterion does not require that the third state has ratified the Geneva Convention without limitations nor that, if it is not a party to it, it ensures all the rights guaranteed therein"[59].

The requirement of "compliant protection" is satisfied, i.e. a third country guarantees sufficient protection of the fundamental rights of refugees, including the right to health and work. This is derived from the comparison of Art. 38 with Art. 39 regulating the concept of safe European third country which - unlike Art. 38, par. 1, letter. e) - expressly requests the ratification of the Geneva Convention without geographical limitations. Neither the provision of restrictions on the freedom of movement and access

58 Asylum Information Database, Greece: the ruling of the Council of State on the asylum procedure post EU-Turkey Deal, op. cit.

59UNHCR. (2016, March, 23). Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept.

to work of the beneficiaries of protection nor the possibility of revoking the status by government provision would be in themselves incompatible with the qualification of a safe third country pursuant to Art. 38, par. 1 of the procedures Directive[60]. Then, it is clarified the requirement of the link between the applicant and the third country in question, necessary for the application of the concept of safe third country by the Member States. This link could result from the transit of the applicant on the territory of the third state, together with specific circumstances applicable to the specific case, such as the duration of the stay in that state or its proximity to the applicant's country of origin[61]. The permanence of the applicant in Turkey for a month and a half and the geographical proximity of Turkey

60Asylum Information Database, Greece: the ruling of the Council of State on the asylum procedure post EU-Turkey Deal, op. cit., parr. 54-56.

61UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, op. cit., p. 6: "(…) there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link (…)".

to Syria, the country of origin of the former, are considered by the judges to be sufficient elements to demonstrate the "reasonable link" referred to in Art. 38, par. 2, letter. a), Directive 2013/32/EU[62]. A qualification that was in fact based exclusively on diplomatic guarantees provided by the Turkish authorities regarding respect for the fundamental rights of migrants in Turkey. The reports of independent bodies active in the field were not taken, however, into consideration for the purposes of the evaluation (Tsiliou, 2018).

The Greek Council of State did not turn to the CJEU for a preliminary ruling in the sentence just cited and to the concept of safe third country according to Art. 38 of the Procedures Directive. In this case it could be clarified that the correct interpretation is a requirement of protection according to the Geneva Convention and that of a reasonable connection. In particular, the link was interpreted by the CJEU in the LH ruling where the judges stated that: "(...) a "link" pursuant to Art. 38, par. 2, letter. a), of the Directive 2013/32/EU"[63] may arise from

62Asylum Information Database, Greece: the ruling of the Council of State on the asylum procedure post EU-Turkey Deal, op. cit., parr. 61-62.
63CJEU, C-564/18, LH v. Bevándorlási és Menekültügyi Hivatal of 19

the simple transit of the applicant through the territory of a given third country, which guarantees the applicant the right to contest the existence of this link with the third country. For this right to have meaning, the link in question must be something more than the act to transit, otherwise the discussion would probably be limited to what type of transit is relevant, whether on foot, by car, by bus or by plane and whether, for example, a twenty-minute stopover during which the potential applicant could have contacting the officials of the country in question is sufficient to create the link in question[64]. Applicants from Turkey cannot automatically be considered as coming from a safe third country. It will instead be necessary to carry out a case-by-case assessment of the position of each applicant, in order to concretely assess the existence of an effective link between the latter and the Turkish state, i.e. a link that does not end in a situation of mere transit[65].

March 2020, ECLI:EU:C:2020:1056, published in the electronic Reports of the cases, parr. 44-50.

64Conclusions of the Advocate General M. Bobek presentated in C-564/18, LH v. Bevándorlási és Menekültügyi Hivatal case of 5 December 2019, ECLI:EU:C:2019:1056, op. cit., par. 53.

65Conclusions of the Advocate General M. Bobek presentated in case C-564/18, LH v. Bevándorlási és Menekültügyi Hivatal of 5 December 2019,

The qualification of Turkey as a safe country and the rulings of the ECtHR[66] highlight and consider that a safe country is appropriate to be based on a legal analysis that verifies the conditions concretely faced by the people who are readmitted to Turkey[67]. The reports, opinions and, recommendations of various governmental and non-governmental organizations have denounced the seriousness of the situation between Greece and Turkey and especially with regards to Syrian citizens[68]. According to Turkish legislation, the levels of types of protection

op. cit.

66ECtHR, J.B. v. Greece of 18 May 2017: "(…) qu'il n'existe pas en Turquie de législation suffisante contre le refoulement ni de protection équivalente à celle offerte par la Convention de Genève de 1951 car, selon lui, la protection temporaire accordée peut être annulée à tout moment, sans examen personnalisé ni possibilité de recours (...)".

67ECtHR, Ilias and Ahmed v. Hungary of 21 November 2019, par. 141: "(…) how the authorities of that country apply their legislation on asylum in practice (…)".

68Parliamentary Assembly of the Council of Europe, The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016, Resolution no. 2109(2016) of 20 April 2016, adopted on the basis of the report doc. 14028 of 19 April 2016; European Economic and Social Committee, Opinion on "Turkey's role in the refugee crisis", adopted in plenary session on 14 February 2018, in OJ EU C 227 of 28 June 2018, p. 20; Asylum Information Database, Country Report: Turkey 2019, published by ECRE. Amnesty International, Europe's Gatekeeper. Unlawful detention and deportation of refugees from Turkey, December 2015.

are different according to the origin of the applicants, thus placing discrimination on national level which concerns access to international protection at its core. The legal framework applies the process of integrating protection beneficiaries into Turkish society and accessing work and basic services such as healthcare and education. Turkish legislation has excluded beneficiaries of international protection as steps towards integration and as limits on their freedom of movement. Of course, doubts still remain regarding the principle of non-refoulement as regards Turkey. A monitoring mechanism of an independent nature according to the model of the Commission in its communication of 2011 which has to do with the evaluation of readmission agreements that have been concluded from the EU is represented as a useful tool to verify the methods of implementation of the declaration by Turkey and respect for human rights and readmitted persons.

Human rights violations and implementation of the statement

The overcrowding of people hosted in the crisis points that are present in the Greek islands is an element that is addressed by the Commission to deal with the migratory crisis that has erupted in

2015. These are structures that had as their objective:

> "(...) quickly conduct the identification, registration and fingerprinting operations of arriving migrants[69], operations necessary to distinguish asylum seekers from irregular migrants with a view to subjecting the former to the procedure for the recognition of international protection and the latter to that of repatriation (...)"[70].

Already, the statement changed the relative function of the hotspots that had to do with the Aegean sea. Everyone who did not request protection had their application rejected and were detained in hotspots waiting to be readmitted to Turkey[71]. The related complaints coming from national and international bodies as well as the difficulties connected with the management of the detention centers have led to a partial change in the situation, i.e. automatic detention which has replaced the obligation that has been imposed on every person who lands on Greek islands and do not leave the territory of the islands and then reside on

69Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda on Migration, COM(2015) 240, of 13 May 2015, p. 7.

70European Commission, The hotspot-based method for managing exceptional migratory flows, 11 September 2015: https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf

71See the Law n. 4375 adopted by the Greek Parliament on 3 April 2016.

hotspots until the end of the protection recognition procedure and in the case of irregulars until repatriation to Turkey.

The overcrowding of hotspots and people from the islands encourages refugees to take the roads to Greece, leading to a decrease in the number of repatriations to Turkey since it tends to readmit migrants who are on the islands and not those who are on the mainland[72]. Thus people remain for a period exceeding five months in various overcrowded facilities with poor sanitary conditions and without basic necessities and at risk to their personal safety[73].

The reception points in the hotspots of the Greek islands are also the subject of rulings of the ECtHR where the appellants complained that their detention in the hotspots constituted inhuman and degrading treatment according to Art. 3 ECHR. This was also contrary to the right to freedom, security according

72European Union Agency for Fundamental Rights (FRA), Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy, Vienna, 25 March 2019.

73Asylum Information Database, Country Report: Greece, 2019 update, pubblished by ECRE, pp. 147 e 157-162. European Union Agency for Fundamental Rights (FRA), Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy, op. cit., p.16.

to Art. 5 ECHR (Gatta, 2018)[74].

In particular, the ECtHR spoke to a violation of Articles 3 and 5, par. 1 ECHR (Villiger, 2023) which recognize the complaints relating to the violation of profiles that are procedural according to the right of personal freedom, respecting however the right to be informed of the reasons for detention according to Art. 5, par. 2 ECHR and to the J.R. and others v. Greece case as well as the right to appeal to a court according to the ex Art. 5, par. 4 ECHR in O.S.A. and others v. Greece and Kaak and others v. Greece cases (South, 2021).

The ECtHR was based on the assumption of detention as open structures that constitute a restrictive measure and not a deprivation of liberty, thus justifying the need to proceed with the identification and registration of migrants who have landed on the islands. The applicants are deprived of liberty only for a period of one month and until the hotposts are transformed from closed facilities into open ones by virtue of the legislative change. For the short period of detention, this is reasonable in light of the legitimate objective to be achieved which is excluded

74ECtHR, J.R. and others v. Greece of 25 January 2018. O.S.A. and others v. Greece of 21 March 2019.

by Art. 5, par. 1 ECHR.

The ECtHR has excluded that the necessary severity threshold considers the treatment as inhuman and degrading also with regard to unaccompanied minors[75]. In the M.S.S. v. Belgium and Greece case are considered the conditions of asylum seekers in the country to be in conflict with Art. 3 ECHR[76] thus suspending the statement where transfers are part of the Commission's recommendation of 8 December 2016[77].

The conditions of reception of migrants is a point of view of the protection of the fundamental rights of the subjects who are involved in the implementation of the statement which constitutes the accelerated border procedure and be applicable to applicants on the Aegean islands after 20 March 2016. The accelerated border procedure after the adoption of the EU-Turkey statement was conceived as an exceptional and applied measure, used to process half of the asylum requests that are registered and

75ECtHR, Kaak and others v. Greece of 3 December 2019, par. 65.
76ECtHR, M.S.S. v. Belgium and Greece of 21 January 2011. CJEU, joined cases: C-411/10 to C-493/10, NS of 21 December 2011, ECLI:EU:C:2011:611, I-13905.
77Commission recommendation to Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013, of 8 December 2016, C(2016) 8525.

canceled by Greece (Masouridou, Kyprioti, 2018). The procedures applicable according to the nationality of the applicants and the place where the applications are registered in relation to international protection are part of the accelerated border procedure applicable only on the islands of the eastern Aegean and not at the land border between Turkey and Greece. Applying the safe third country criterion, applications from non-Syrians who are not from third countries with a recognition rate that is less than 25% are examined for admissibility accordingly. Applications from non-Syrian asylum seekers from countries with a recognition rate of less than 25% are examined on their merits only. This type of practice allows us to say that it conflicts with Art. 3 of the Geneva Convention of 1951 which states:

> "The contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin (...)".

This is a discrimination that has national origin. Furthermore, we note the difficulty that this type of procedure is in conflict with the procedure directive where the reduced deadlines can be reasonable and guarantee a way in which decisions relating to applications for international protection are adopted after an

individual, adequate and complete examination for each request and where the right of the applicants to legal assistance and to an effective remedy in the event of a negative decision are guarantees that are at stake as Articles 19, 41 and 42 CFREU (Bobek, Adams Prassl, 2020). Only the EU Agency for Fundamental Rights stated that:

> "(…) the processing of asylum claims in facilities at borders, particularly when these facilities are in relatively remote locations, although per se not unlawful, brings along built-in deficiencies. As almost three years of experience in Greece shows, this approach creates fundamental rights challenges that appear almost unsurmountable (…)" (Labayle, De Bruycker, 2016)[78].

Concluding remarks

The type of protection which was perhaps first seen in the European context through the EU-Turkey statement considers that the Union and European leaders have achieved an application of the model of cooperation with other third

78European Union Agency for Fundamental Rights (FRA), Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy, op. cit., p. 7.

countries[79].

The final balance is not so positive and does not appear in the institutional documents. On the one hand, the 1 to 1 system has failed and the decline in departures from Turkey and the number of deaths in the Aegean has followed in practice: "(...) a rapid increase in migratory flows towards other southern European countries (...)"[80].

The statement sought to impact on fundamental rights of the people involved. This is a protection against direct and indirect rejections regarding repatriation to Turkey, violation of the right to freedom, security, prohibition of inhuman and degrading treatment as well as detention in hotspots and protection against collective expulsions which occur where repatriates are denied according to the violation of Articles 41 and 47 CFREU (Bobek,

79Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new deal on migration and asylum, of 23 September 2020, COM(2020) 609, pp. 18-27.

80Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new deal on migration and asylum, of 23 September 2020, COM(2020) 609, op. cit.

Adams Prassl, 2020) and the related right to obtain an individual review of the return decision.

The statement for the Turkish authorities has put in order the commitment to contain the departures thus preventing migrants from leaving Turkey to undertake the journey to Europe. It is a problematic model which is based on the transition from push-back to pull-backs imigrants and not only to the ban on refoulement with the right of everyone to leave any country enshrined in Art. 2, par. 2 of the Fourth Additional Protocol of the ECHR and Art. 12, par. 2 of the International Covenant on Civil and Political Rights (Labayle, De Bruycker, 2016). We cannot talk about absolute rights, restrictions on the freedom to leave a country which are provided for by law and the specific needs of the protection of public order and national security but about the prevention of crimes, the protection of health, the protection of human rights and the freedom of others[81].

According to Turkey:

> "(...) the European Union – which claims to respect human rights in its external relations policy – should also be concerned, especially since this right to leave is being challenged more and

81Article 2 par. 3 of the Fourth Additional Protocol to the ECHR and Art. 12 par. 3 of the International Covenant on Civil and Political Rights.

> more by the outsourcing of migration control (…)" (Labayle, De Bruycker, 2016).

On the other hand, the European jurisdictions have avoided, as we have seen from the jurisprudence on the issues and from a political point of view, that the declaration in its implementation qualifies the statement as an act specific to the Member States and calls it incompetent to rule on the violation of the procedure relating to the conclusion of the international agreements concluded by the Union and as regards human dignity, the right to asylum and the prohibition of refoulement. The ECtHR has excluded the compatibility of the reception conditions of the hotspots that are present in the Greek islands and according to the conventional rules, thus excluding the violation of Articles 3 and 5 of ECtHR taking a different position from the past according to other evaluation standards and to a wider margin of appreciation to the respondent state.

Different instruments are noted regarding the CJEU and international agreements based on Art. 218 TFEU bypassing the substantive and procedural guarantees that are contained in primary Union law that arise spontaneously. The use of a parallel universe of the intended policies does not constitute a means of

escaping respect for the rights and guarantees that the Union aims to promote through its external action and as a policy of the Union (Blanke, Mangiamelli, 2021)[82].

Thus the European Ombudsman himself, in relation to the political nature of the statement, recognizes the relative needs of realpolitik under the cooperation between the EU, Member States and Turkey in the relative management of migratory flows:

> "(...) political actions must be judged by those same principles and standards which are intended to inform all of the actions of the EU institutions (...)"[83].

The statement has a political character but without placing the obligation of the institutions in a secondary order in front of the guarantees of their action which respects the fundamental rights of the people who are part of it. The history of immigration between the EU and Turkey as well as between Greece and Turkey will continue for the next few years and the political instruments and not only will have to take into consideration that first of all it is human life that counts and not national, European

82Art. 3 par. 5 TEU.

83Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement of 18 January 2017, parr. 23-27 and 33.

or international policies.

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